IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 604 OF 2003

IN

SUMMARY SUIT NO. 1007 OF 2003

Polaroid India P.Ltd ......Plffs.
vs.
Nav Nirman Co. and Ors. ......Defnds.

Janak Dwarkadas i/b. Mustafa Motiwala
for the plaintiffs.
Nitin Thaakker i/b. M.R. Dhaneja
for the defendants.

CORAM: S.U. KAMDAR, J.

DATE : 27th October, 2005.

JUDGMENT :

1. The present suit is filed for the recovery of the amount given under leave and licence agreement towards the security deposit. Under the said leave and licence agreement the defendant have given to

the plaintiff the premises on leave and licence basis and on return of the premises the security deposit of Rs.1,60,00,000/- was required to be returned by the defendant to the plaintiff. The defendant has offered the said premises and by letter dated 12.8.99 even removed themselves from the premises and offered to hand over possession to the defendant. The defendant however has not accepted the possession thereof and contends that there is infact an agreement to sale the said premises. Learned counsel for the defendant in support of his contention has contended that actual arrangement which was arrived at was of sale of the said premises to the plaintiff and he relies upon two subsequent agreements being dated 1.7.95 and an undated agreement. The agreement dated 1.7.95 merely states that during the period of licence the agreement will not be terminated by either of the parties and no effect will be given to Clause-9 and 12 of the said agreement. The second agreement which is an undated agreement inter-alia gives an option in favour of the plaintiff to purchase the said premises from the defendants at any time

within last three months of the licence period on the various terms and conditions which are set out therein. It is an admitted position that no such option has been exercised by the plaintiff for the purchase of the said premises.

2. The terms and conditions of the said option agreement inter-alia provided that if the plaintiff is not interested in exercising the option to continue the leave and licence agreement then in that event he will he have an option to purchase form the defendant the said premises at a price of Rs.1,75,00,000/-. This option was required to be exercised by the purchaser during the last three months of the licence agreement i.e. from 15.4.1999 to 14.7.1999. Clause -2 of the said agreement further provides that this option has to be exercised by the purchaser by delivering the vendor a letter intimating the exercise of the said option and that also should be strictly within the period of 2 months as contemplated thereof. The said option further required a forwarding to the defendant a sum of Rs.15.00 lacs and that the

vendor were given the power to adjust the security deposit amount of Rs. 1,60,00,000/- against the balance consideration. The address attached to the said letter was also required to be specified in clause 2 of the said agreement. Further under Clause 3 of the said agreement immediately on exercise of option, the agreement was required to be filed with the Income Tax authorities by filing Form 37(i) for obtaining no objection u.s. 269 (u)(c) of the Income Tax Act. In clause 4 it was provided that if such option is exercised then a regular agreement for sale should be entered into between the parties. What is most crucial in the present case is Clause 5 of the said agreement. The said Clause 5 provided that on failure of the plaintiff to exercise the option within a period stipulated therein and in a manner stipulating in the said option agreement the same would lapse. Clause 5 of the said agreement reads as under :

> "5. If for any reason the Purchaser fails and/or neglects to exercise the option strictly within the said period of three month the option shall automatically lapse and thereafter it will not be available to the purchaser."

3. It is an admitted position that no such option has been exercised by the plaintiff. On the contrary the purchaser has declined to exercise the option by giving a notice dated 12.6.99 and have terminated the said leave and licence agreement. On such termination of leave and licence agreements the plaintiffs has sought refund of the amount of security deposit of Rs.1,60,00,000/- on their handing back possession of the said premises.

4. In my opinion in the light of the aforesaid facts the contention raised by the learned counsel for the defendant that there was a concluded and binding agreement for sale between the plaintiff and the defendant inrespect of the purchase of the said premises cannot be accepted because the agreement which has been relied upon by the defendant itself provides that it is a mere right to exercise a option and only on such exercising of the option that the agreement would come into

existence between the parties. The conditions precedent for such agreement to come into existence are also stipulated in the said option agreement. Admittedly no such condition precedent are also complied with.

5. In that view of the matter I do not find any substance in the contention of the learned counsel for the defendant that because of the option agreement there s a concluded and binding agreement arrived at for sale by the defendant to the plaintiff and therefore the defendant is not liable to refund the earnest money of Rs.1,60,00,000/-. The defence raised in my view is totally frivolous and bogus and contrary to the written agreement between the parties. I therefore do not find any substance in the present case.

6. In that view of the matter I am of the opinion that the defendants could be permitted to defend the suit on a condition that the defendant to deposit in this court a sum of Rs.1,60,00,000/-. In so far as the keys of the flat are concerned the

plaintiff offers that the said key may be kept in the custody of the Prothonotary and Senior master, and they have no objection that it may be handed over to the defendant on defendant depositing the aforesaid amount of Rs.1,60,00,000/- in this court. In view thereof I pass the following order :

(i) The defendant is granted conditional leave to defendant the present suit on depositing Rs.1,60,00,000/- within a period of 8 weeks from today failing which the plaintiff will be entitled to decree. The plaintiff will deposit the keys of the said premises with the Prothonotary and Senior Master within seven days from today. The Prothonotary and Senior Master would keep the said keys in sealed envelope to the credit of the suit. The defendant will be entitled to the said keys on their depositing the said sum of Rs.1,60,00,000/-.

(ii) The plaintiff will be entitled to apply for withdrawal of the said sum of Rs.1,60,00,000/- deposited by the defendant only if they have deposited the keys with the Prothonotary and Senior master inrespect of the said premises. If the amount is so deposited for the time being the office of the Prothonotary and Senior Master to invest in fixed deposit initially for a period of one year and renew the same from time to time. In an event if the plaintiff applies for withdrawal of the said amount and the court grants the same on such terms and conditions as court may deem fit and proper then the Prothonotary and Senior Master, High Court to abide by the said directions.

(iii) If the amount is not so deposited the keys will be retained by the Prothonotary and Senior Master and will be handed over

to the defendant only on the decree being passed and the decree is executed and the amount is so realised.

(iv) If the amount is deposited then suit be transferred to the list of Commercial Causes. Written statement or points of defence to be filed four weeks from the date of deposit. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.

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